**IN THE PROVINCIAL COURT OF NOVA SCOTIA**
**Citation: R. v. Swinimer , 2005 NSPC 59**

**Date:** 20051223
**Case No.:** 1498639
**Registry:** Halifax

**Between:**

**Her Majesty the Queen**

**v.**

**Nicholas James Swinimer**

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| **Judge:** | The Honourable Judge C. H. F. Williams, JPC |
| **Heard:** | Decision rendered orally on December 23, 2005 in Halifax, Nova Scotia |
| **Written decision:** | Released on January 18, 2006 |
| **Counsel:** | Susan I. MacKay, for the Crown<br>Donald L. Pressé, for the Defence |

## By the Court

### Introduction

**[1]** As he was walking along the east side of Brunswick Street, near the Metro Centre, in the Halifax Regional Municipality, in the early morning of November 27, 2004, Bradley Ross, who was going to the Citadel Inn Hotel, after a night of drinking alcoholic beverages, saw a man and a woman on the west side of the road, yelling and screaming at each other. From his vantage point, he saw that the man appeared to put his hand on the female's throat, then let go, as if on reflection, and also appeared to become apologetic for his actions. The woman ended up against the Citadel Hill's retaining wall and Ross felt that although it appeared that she was not trying to pull away from the man the forceful movement of his arms appeared to push her against the wall. Likewise, Ross opined that it was also possible that she moved against the wall to avoid being grabbed by him.

**[2]** Upon arriving at his hotel and after a few minutes, Ross decided to return downtown in order to get something to eat. In the same area where he had earlier seen the two persons he now saw an ambulance on the scene. When he went to investigate what had taken place he saw the female whom he had seen earlier arguing with the man, in the ambulance, and her face was covered with blood. He did not see the man. Subsequently, Ross related what he earlier had observed to the police. As a result of this and other information, the police charged the man, identified as Nicholas James Swinimer, the accused, with committing an assault on the female, Tara White, that caused her bodily harm.

**[3]** The accused has denied that he struck the complainant or caused her bodily harm. Supported by the complainant, he argued that the complainant was the aggressor; he used no more force than was necessary to prevent her continuing assault upon him; and, the causation of the complainant's injury was accidental. This case, in my view, on the total evidence, is essentially a consideration of the reliability and creditworthiness of the defence witnesses and the duty of the Crown to see that all available legal proof of the facts in issue are presented.

### Summary of Relevant Evidence

**[4]** (a) for the Crown

> Essentially, the evidence for the Crown disclosed that the event occurred after the closing of the drinking establishments. Bradley Ross, who had been celebrating his birthday with a few drinks was on his way to his hotel, on Brunswick Street, when he saw a man and a woman yelling and screaming at each other. The man appeared to put his hand on the woman's neck and pushed her up against a nearby wall. Ross did not intervene as the physical contact was brief and, believing that all was well, he continued on his way. However, a few minutes later as he was going past the same location, he

saw an ambulance and inside was the same woman whom he now observed had blood on her face.

**[5]** Michel Bitar was a taxi driver who was traveling along Brunswick Street with three passengers in his taxi. While operating his vehicle, in moderate traffic and at a speed of about 50 kph, between ten and fifteen minutes and from a distance of forty to fifty feet, he saw a man and a woman, on the sidewalk. He believed that they were arguing with each other. Also, he saw the man leaned toward the woman, as if in a dare, and that she slapped him. After that, the man grabbed her and pushed her against a nearby wall. Bitar did not stop but called 911.

**[6]** Roy Cantwell, a student, and his brother Conner, were returning home after a night out and consuming alcoholic beverages. On Brunswick Street, in the same area as indicated by the other witnesses, he saw a woman walking quickly. She was frantic and had lots of blood in her hair and on her clothes. A man who was following behind her was attempting to reach and to calm her down, but she did not want to have anything to do with him. She said: "This guy hit me". To which the man retorted, "No, no, she fell". The brothers kept the parties separated. Nonetheless, Cantwell perceived that the woman was intoxicated but that the man seemed composed and was trying to calm her down.

**[7]** The paramedic who attended the scene was Ken Bonnell. He observed that the woman was very upset and that she had a small cut on the right side of her head. Also, there was blood on the right side of her face and on her clothing. Observing no other injuries, he transported her to the QEII Triage Department for any further or other medical intervention.

**[8]** When Constable Christian Pluta arrived on the scene, two other police officers, Sgt. Zima and Constable James Bennett, were present. Zima had arrested the accused, who was intoxicated, and turned him over to Pluta. After he had transported the accused to the Halifax Police Department, Pluta cautioned and *Chartered* him and the accused spoke with duty counsel. Pluta observed blood on the accused shirt and pants and that he had two open lacerations on his knuckles. However, Pluta did not seek nor received any explanation for these observed injuries.

**[9]** After speaking to duty counsel, the accused made a statement to Pluta. The parties agreed that the statement was voluntary and the accused waived the right of a voir dire and the following statement was admitted:

> " I don't know what happened. I grabbed her and then she started bleeding. I never did anything purposely or intentionally. If anything happened, it was an accident".

**[10]** (b) for the accused

The complainant testified that she is twenty-two years old and for the past two years was the accused's common law wife. She is now pregnant with his child. On the evening in question she and the accused went to a local bar for drinks. However, as the evening progressed, she became intoxicated and began to argue with the accused over an incident. Losing her temper she became aggressive and started to punch him as he was attempting to calm her and to prevent her from continuing to strike him.

**[11]** Leaving the bar in an angry, intoxicated and agitated state, and followed by the accused, the complainant walked north on Brunswick Street. The accused, who was also intoxicated, continued to beseech her to be calm but she remained ill-tempered and, in anger, struck him several times with a closed fist. Even so, the accused made no retaliatory counter-strikes. However, he pushed her to stop her striking him and when he did so she flung herself backwards. In doing this physical movement she struck her head against the wall causing an injury that began to bleed. At the sight of her blood she became frantic and did not want to have any further communication or contact with the accused. Later, after the police arrived, an ambulance took her from the scene to the hospital where she did receive medical attention for the head wound. However, the wound did not interfere with or affect her daily activities.

**[12]** She denied that she told the police that the accused had grabbed her by the throat or that she had told anyone that the accused had struck her. Likewise, she denied that the accused was jealous and had struck her. Further, she maintained that she was upset and frantic and wanted to get away from the accused and that she had not sustained any injuries on her body, caused by the accused. Moreover, she insisted that she was the aggressor throughout and that the accused had merely pushed her to prevent her from continuing to punch him.

**[13]** The accused testified that he and the complainant went to a local bar and that he had consumed six to eight beers. During the evening he thought that another male had bothered the complainant and commented to her about it. She, however, became extremely upset and, in a rage, ran out of the bar. He followed her and tried to calm her down but she turned and struck him in the face several times. When he grabbed her, she pulled away from him and in doing so she struck her head against the wall. He denied that he lifted her by the throat or ever touched her neck but admitted that he was angry andthat she had punched him in the face. Concerning his bruised knuckles he explained that at the bar he was frustrated with the complainant and had, in exasperation, punched a wall and thus injuring himself.

## Findings and Analysis

**[14]** Here, credibility is the principal issue. In my view, the Crown's approach in the prosecution of this case has attenuated the reliability and trustworthiness of the witnesses and has also personalized their testimonies, particularly that of the complainant, concerning the alleged delict. I noted that the complainant did not testify for the Crown as the Crown, in the course

of the trial, expressed the view that she was an unreliable and untrustworthy witness. Likewise, the Crown took the view that it preferred not to subject the complainant's testimony, whatever it might have been, to the rigorous procedures of the ***Canada Evidence Act***, ss. 9 or 10. On that approach, the Crown was relying upon, or anticipating that the complainant would testify on behalf of the accused and hoping that it could prove its case against the accused and possibly obtain a conviction should he, the accused, elect to present evidence.

**[15]** In the case at bar, recognizing that the Crown has the prerogative to call any witness to prove its case, two cardinal principles come to mind. First, in ***Boucher v. The Queen***, (1954) 110 C.C.C. 263 (S.C.C.), when addressing the issue of the Crown's duty in the prosecution of cases, Rand J., stated:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

**[16]** Second and additionally, in the same case and on the same topic Locke J., articulated the following principle that:

> It is improper, in my opinion, for counsel for the Crown to express his opinion as to the guilt or innocence of the accused. In the article to which I have referred it is said that it is because the character or eminence of a counsel is to be wholly disregarded in determining the justice or otherwise of his client's cause that it is an inflexible rule of forensic pleading that an advocate shall not, as such, express his personal opinion of or his belief in his client's case.
>
> In an address by the late Mr. Justice Rose, which is reported in 20 **C.L.T.** 59 at p.62, that learned Judge, referring to Mr. Rogers' article, pointed out a further objection to any such practice in the following terms: "Your duty to your client does not call for any expression of your belief in the justice of his cause ... The counsel's opinion may be right or wrong, but it is not evidence. If one counsel may assert his belief, the opposing counsel is put at a disadvantage if he does not state that in his belief his client's cause or defence is just. If one counsel is well known and of high standing, his client would have a decided advantage over his opponent if represented by a

younger, weaker, or less well known man."

In my opinion, these statements accurately define the duty of Crown counsel in these matters.

An extract from one of the passages taken from the address of counsel for the Crown by my brother Cartwright reads: (Translation) "It is the duty of the Crown, when an affair like that happens, no matter what affair, and still more in a serious affair, to make every possible investigation, and if in the course of these investigations with our experts, the conclusion is come to that the accused is not guilty or that there is a reasonable doubt, it is the duty of the Crown, gentlemen, to say so or if the conclusion is come to that he is not guilty, not to make an arrest ..."

**[17]** The essential aspect of the Crown's theory, as I apprehend it, was not that the complainant was a reluctant witness but, rather that her testimony would not support the Crown's proof of the facts and therefore, without putting it to the test, declared that her testimony was unreliable and untrustworthy, an issue for the trial judge to determine. That approach, in my view, would tend to put the accused in an ethical dilemma and at a disadvantage as the Crown has stated, on the record, that in effect, should the accused present the complainant as his witness, he would be relying, without proof of such, on an unreliable and untrustworthy witness. It would also, in my opinion, have the tendency to inadvertently shift the burden by compelling the accused to call the complainant as his witness in order to prove his or her innocence.

**[18]** However, in such a case, as here, it would appear that the Crown has also presented itself with an ethical conundrum. If it concludes that the complainant, its main witness to prove the elements of the offence in issue, is unreliable and untrustworthy and it declines to submit or test that witness' testimony under oath and, it cannot prove beyond a reasonable doubt the guilt of the accused without that witness' testimony, the question arises: Is there a case for the accused to meet? I think that it must be remembered that, a criminal trial is not a credibility contest and that in all instances, the burden is always on the Crown to prove its case against the accused beyond a reasonable doubt and that the onus never shifts to the accused to prove his or her innocence or to show that the accused evidence might reasonably be true. See: ***Woolington v. D.P.P.*** [1935] A.C. 462 (H.L.) ***R. v. Tyhurst*** (1993), 79 C.C.C. (3d) 238 (BCCA).

**[19]** At the end of the Crown's case, however, notwithstanding its obvious slenderness on the essential elements of the offence as charged, the accused counsel was content only to challenge the fact that, on the evidence submitted, the Crown had failed to prove that the alleged injury met the test of "bodily harm" as defined in the ***Criminal Code***. Even so, the accused counsel was not prepared to admit that his client had committed an assault. However, when he apparently recognized the internal inconsistency or incongruity of his motion and rather than seek an appropriate motion for a directed verdict, he withdrew his

partial challenge and elected, as was his intention, to call evidence.

**[20]** The theory of the defence as I understand it was that the complainant was the aggressor throughout and that the accused used no more force than was necessary, in the circumstances, to prevent her continuing attack upon his person. Furthermore, the accused had no intention to hurt the complainant and any injury sustained by the complainant was accidental and caused not by the accused but by her own activity when she pulled away from him.

**[21]** The Crown's contention that because the wound bled profusely, that of itself, without more, constituted "bodily harm". However and respectfully, that proposition does not accord with "bodily harm" as defined in the ***Criminal Code*** s.2, as " ... any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature". Here, there was no evidence that the injury that she suffered interfered with the health or comfort of the complainant and that it was "more than merely transient or trifling in nature".

**[22]** First, on the issue of causation, the complainant testified that the injury was more or less occasioned as a result of her own physical activity. I accept and find that her testimony had internal coherency and context and gave background details of how she received the wound. Likewise, it gave relevant information about her bodily sensations, facts about which one who had gone through that experience would know. Second, she also testified, which I find and accept, that she received no sutures or stitches for the wound. Moreover, it did not require any further treatment and it did not affect her day to day activities. Her testimony stands uncontradicted. Therefore, I conclude and find that her injury did not amount to "bodily harm" as defined in the ***Criminal Code***.

**[23]** Nonetheless, on the total evidence, I accept and find that both the accused and the complainant were to some degree intoxicated. I accept and find that they had a disagreement or misunderstanding concerning an incident in the bar. As a result, the complainant became irate and upset with the accused and decided to leave the bar which she did in an agitated state of mind. I accept and find that he followed her and attempted to calm her down. However, she became aggressive and punched him in the face. Additionally, I accept and find that he in some fashion, whether by holding her as he testified or putting his hand on her throat as opined by Ross, was attempting to prevent her from further striking him. The evidence also discloses, and, I also accept and find, that the parties were mutually pushing each other in a confrontation of sorts with the complainant as the aggressor.

**[24]** Therefore, from the total evidence, I conclude and find that as it is "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions", the accused, in holding the complainant, in the circumstances, used no more force than was necessary to prevent any further assault upon himself. See: ***Faryna v. Chorny***, [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357, ***R. v. W.(D.)***, [1999] 1 S.C.R. 742. Furthermore, the injury suffered did not amount

to “bodily harm” to vitiate any consent to the mutual physical contacts. See: ***R. v. Shand***, [1997] N.S.J. No. 524 (S.C.).

## Conclusion

**[25]** In the resolution of the issues before me and on a consideration of the whole case, for the reasons stated, I was not satisfied that the evidence presented by the Crown was adequate to the task of determining the guilt of the accused beyond a reasonable doubt. On my weighing and assessing the evidence before me I find and conclude that even though I may not have fully accepted the version of the event, as submitted by the accused, on the total evidence and, in my opinion, the Crown, for the reasons stated and on the above analysis, has failed to prove his guilt beyond a reasonable doubt. I therefore find him not guilty as charged and will enter an acquittal on the record.